NO. 46845-5-II-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ALICIA OLIVARES CASTANEDA, Petitioner

CLARK COUNTY SUPERIOR COURT CASE NO. 13-1-00678-2

PETITIONER'S REPLY TO STATE'S RESPONSE BRIEF

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A. COUNTERSTATEMENT OF THE ISSUES FOR REVIEW

1. Did Alicia Olivares Castaneda receive ineffective assistance of counsel where her attorney failed to advise her of the immigration consequences of pleading guilty to Theft-Welfare Fraud?

2. Did Alicia Olivares Castaneda receive ineffective assistance of counsel where her attorney failed to educate her regarding the requisite mental state required for conviction and her options other than pleading guilty?

3. Did Alicia Olivares Castaneda receive ineffective assistance of counsel where her attorney failed to notice obvious intellectual limitations and respond accordingly?

B. REPLY TO STATE'S BRIEF: DEFENSE COUNSEL DID NOT PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL

Despite the State's attempt to confuse the issues, the facts make clear that defense counsel in Petitioner's original criminal case did not provide effective assistance of counsel in four significant ways. First, he failed to adequately advise his client regarding the immigration consequences of a guilty plea, in that: 1) he failed to advise her that the plea would preclude discretionary relief from removal; 2) he failed to explain the clear consequences of a guilty plea, instead relying on a perfunctory warning that the plea would subject her to deportation; and 3) he failed to use available resources to determine the clear immigration consequences of conviction. Second, defense counsel failed to educate Ms. Olivares

Castaneda about the requisite mental state required to prove the charges or explain or offer her any options other than the option of pleading guilty. Last, defense counsel failed to notice Ms. Olivares Castaneda's obvious intellectual limitations and respond accordingly by providing simplified explanations and engaging more fully in conversation to evaluate her level of comprehension of the proceedings and her options.

C. ARGUMENTS IN REPLY TO STATE'S BRIEF

1. Defense counsel's performance was deficient because he failed to advise on critical immigration consequences of the plea, including the availability of discretionary relief from removal.

In *Padilla v. Kentucky*, the Supreme Court held that under the Sixth Amendment right to effective assistance of counsel, defense counsel must advise noncitizen defendants of the immigration consequences of a plea. 130 S.Ct. 1473 (2010). Absent that affirmative, competent advice, the defendant can raise a claim of ineffective assistance of counsel. *State v. Sandoval*, 249 P.3d 1015 (2011).

Per *Strickland v. Washington*, to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate 1) deficient performance as measured by reasonable, professional norms, and 2) prejudice. 466 U.S. 688 (1984). The purpose of *Strickland* is to ensure "fundamental fairness of the proceeding. *Id.* at 670. In the plea context,

fundamental fairness requires that the defendant has the necessary information to make an informed decision. For a noncitizen to make an informed decision about a plea, she must understand the immigration consequences, including the availability of discretionary relief. See *INS v. St. Cyr*, 533 U.S. 289 (2001) (finding that the availability of discretionary relief from removal can be an important, if not *the* most important, consideration for a defendant weighing the risks and benefits of a plea).

In this case, defendant's conviction of Theft in the Second Degree-Welfare Fraud not only make her deportable and inadmissible, but also makes her ineligible for Cancellation of Removal. Prior counsel's affidavit states that, while he believes he informed defendant that she would be "subject to deportation" he does not recall if he told her that she would not be eligible for Cancellation of Removal. The availability of relief from removal was critical information that defendant needed to make an informed decision about the plea. A boilerplate warning that defendant would be "subject to deportation" does not suffice. Thus, counsel's failure to provide that critical information to Ms. Olivares Castaneda was ineffective assistance of counsel.

Additionally, counsel's warning that Ms. Olivares Castaneda recalls that she might get "picked up" by immigration authorities is equally vague and unhelpful. Getting "picked up" by immigration authorities is not a unique consequence to the charges or situation in defendant's case. Rather, any noncitizen convicted of a crime risks

getting "picked up" by immigration and certain other non-citizens risk getting "picked up" without any criminal conviction. Thus, non-specific advice about getting "picked up" by immigration is not specific advice as to the risk of immigration detention in defendant's case and also falls below the *Padilla* standard.

2. Defense counsel's performance was deficient because, despite the clear consequences of the plea, he failed to give more than a general warning regarding deportation.

The Court in *Padilla* found that where immigration consequences are "truly clear," counsel must provide specific advice as to the immigration consequences. If the law is uncertain, then counsel must provide a general warning that "pending criminal charges may carry a risk of adverse immigration consequences." *Padilla* at 1477. *See Ellis v. United States,* 806 F.Supp.2d 538 (E.D. NY 2011) (finding that where jurists reach reasonable but contrary conclusions on the same issue, the law on that issue cannot be succinct and straightforward).

When the consequences are not statutorily explicit, but are nonetheless ascertainable, then the scope and nature of the advice depends on the clarity of law. The rationale underlying *Padilla* and *Strickland* makes clear that the Court envisioned counsel's duty to expand and contract proportionally with the clarity of law. Specifically, the Court stated that when the immigration consequence is clear, then "the duty to give correct advice is equally clear" and that lack of clarity in the law

"will affect the nature and scope of counsel's advice" but not necessarily reduce the duty to a general warning. *Padilla* at note 10.

In *Padilla*, the immigration consequences were "truly clear" because it was explicit in the immigration statute, thus specific advice was required. In *Ellis*, the consequences were uncertain because of a circuit split. 806 F.Supp.2d 538. The issue in *Sandoval* was neither "truly clear" nor "uncertain," but the Washington Supreme Court found the consequences were "straightforward enough" because they were ascertainable through reasonable research. Because the consequences were "straightforward enough," counsel was required to give specific advice about the immigration consequences. *State v. Sandoval* at 1020.
Here, like in *Sandoval*, the consequences of a conviction for Theft in the Second Degree—Welfare Fraud are not statutorily explicit but are "straightforward enough."

While immigration authorities have not directly addressed whether RCW 74.08.331 is categorically a crime involving moral turpitude, crimes that have fraud as an element or are inherently fraudulent, i.e. involve false representation to gain something of value, are crimes involving moral turpitude. *Navarro-Lopez v. Gonzalez,* 503 F.3d 1063 (9th Cir. 2007); *see also Tijani v. Holder*, 628 F.3d 1071, 1075-1079 (9th Cir. 2010) (finding that crimes involving fraud are considered to be crimes involving moral turpitude). Unless and until a court with authority over immigration issues does directly address the Washington statute, a sliver

of ambiguity inures because possible arguments may be made contrary to this prevailing, simple analysis. However, the government should not be able use the ambiguity argument to defeat the requirements of *Padilla* where the alleged ambiguity rests on a potential, long shot argument against application of a clear principle of immigration law.

The State continues to conflate the issues by citing *State v. Ramos* to prove that the immigration consequences of theft are "unclear." 181 Wn.App. 743, 326 P.3d 1015 (2011). The issue is not whether the consequences of theft are clear; the issue is whether the consequences of a conviction of Theft in the Second Degree—Welfare Fraud are clear. In *Ramos*, the court found that "fraud and deceit did not infect ...[the] theft" conviction. *Ramos* at 831. Thus, it was unclear there whether, as the defendant asserted, theft necessarily carried the same adverse consequences as fraud. The present case is inapposite to *Ramos*. Here, fraud explicitly "infects" the conviction, rendering the immigration consequences clear. The State cannot hide behind theft in an attempt to obscure or avoid the heretofore clear consequences of fraud.

Similarly, the State here also tries to create some kind of obscurity where none exists in the record. The State argues that defendant was not convicted of RCW § 74.08.331 Welfare Fraud, despite the Felony Judgment and Sentence stating "THEFT IN THE SECOND DEGREE—WELFARE FRAUD" and listing the statutory codes for Welfare Fraud, Theft in the Second Degree, and Complicity. RCW §§

74.08.331/9A.08.020(3)/9A.56040(1)(a). The State argues that the numerous references to fraud in the record of conviction are "mere surplusage." Even if that were true, allowing such immigration-fatal surplusage into the record of conviction is alone enough to find ineffective assistance of counsel under *Padilla.* If defense counsel were aware that a good argument exists that a Washington theft conviction is not a crime involving moral turpitude, then counsel would have fought to remove the fatal fraud language, which clearly invokes categorization as a crime involving moral turpitude. Thus, allowing the fraud language into the judgment and sentence or failing to attempt to remove it, constitutes additional evidence of counsel's general failure to comply with the requirements of *Padilla.*

Moreover, the immigration court will look at the record of conviction to determine under what statutes defendant was convicted. Here, the record of conviction explicitly states defendant was convicted of Theft in the Second Degree—Welfare Fraud. Absent relief from this court, defendant is nearly guaranteed to suffer the clear immigration consequences of a fraud conviction.

3. Defense counsel was deficient because he failed to use available resources to ascertain the immigration consequences.

Padilla and *Sandoval* found that reasonable professional norms require defense counsel to investigate the immigration statutes and relevant case law. The court in Padilla explained, "it is quintessentially the

duty of counsel to provide her client with *available advice* about an issue like deportation and the failure to do so clearly satisfies the first prong of the Strickland analysis." *Padilla* at 1484 (emphasis added). As noted in the *Washington Court Judicial Immigration Resource Guide*, "nowhere are resources more readily available than in Washington State," citing to The Washington Defender Association's Immigration Project (WDA's Immigration Project). Chapter 3, p. 3-11 (available at https://www.courts.wa.gov/content/manuals/Immigration/ImmigrationResourceGuide.pdf).

Here, nothing in the record suggests that defense counsel sought the assistance of WDA's Immigration Project or engaged in basic legal research to determine the clear consequences of a plea to Theft in the Second Degree—Welfare Fraud. Rudimentary legal research would have revealed the clear principle of immigration law that fraud involves moral turpitude, and that a CIMT in defendant's case results in deportability and ineligibility for Cancellation of Removal. *See also*, Exhibit A, Immigration Customs and Enforcement, Department of Homeland Security, Motion to Pretermit EOIR-42B Application. Because the immigration consequences of Theft in the Second Degree—Welfare Fraud are clear, defense counsel was obligated to give more specific advice. Here, counsel did little more than parrot the general warning in the plea form that defendant would be "subject to deportation," falling far below the standards of *Padilla* and *Sandoval*. *See also Washington Court*

Judicial Immigration Resource Guide, Chapter 3, p. 3-8 (advising that the deportation warnings under RCW § 10.40.200 do not mitigate defense counsel's Sixth Amendment obligations.)

4. Defense counsel was deficient because he failed to communicate the nature of criminal proceedings and the consequences of plea, adequately ascertain her ability to comprehend, or assure her comprehension, rendering her plea unintelligent.

The State's response to Ms. Olivares Castaneda's arguments below regarding the lack of adequate explanation of the criminal proceedings and the consequences of the plea disingenuously disregard the fact that the only real evidence of the interactions between counsel and client are the recollections of counsel and the client. While the state relies on its attempt to somehow discredit Ms. Olivares Castaneda's supporting affidavit as insufficient evidence, while disregarding the additional affidavit filed, nowhere has the state obtained any independent evidence to directly contradict her assertions.

To the contrary, defense counsel's affidavit indicates that although he would typically explain the concept of intent and *mens rea*, he had no specific recollection or knowledge of what he actually did in this case. Such a declaration does not directly contradict Ms. Olivares Castaneda's assertions regarding the lack of explanation and understanding. Nor was defense counsel able to provide any assurance or documentation regarding the appropriateness or capacity of the interpreter who facilitated the out of court communications. The state somehow suggests that a brief, in-court

colloquy is sufficient to cure any potential lack of communication outside of the courtroom. However, *Padilla* and other sources of law indicate that counsel's obligations are not limited to reading the plea petition to the client before court.

Moreover, the state completely failed to address more than one argument brought in the original motion. First, the state simply reiterated its position regarding the validity of Ms. Olivares Castaneda's supporting affidavits, but provides no precedent for attempting to discredit her affidavit on some theory that a "self-serving" declaration is not competent evidence. Additionally, the state again relies on the "yes or no" colloquy conducted on the record and fails to counter Ms. Olivares Castaneda's arguments and precedent that such colloquy is insufficient to assure sufficient comprehension. By extension, the colloquy is certainly insufficient to complete the record regarding the full exchange of information between attorney and client outside of court.

Courts have routinely found counsel to have an obligation to ensure that clients meaningfully understand their rights and options within the criminal justice system. *See Keys v. United States*, 545 F.3d 644, 646 (8th Cir. 2008) (finding duty not satisfied where counsel informed client of right to appeal but did not ensure that client meaningfully understood right); *Canann v. McBride,* 395 F.3d 376, 384-86 (7th Cir. 2005) (finding duty not satisfied where counsel did inform client of right, but did not ensure that defendant fully understood right to testify); *Boria v. Keane*, 99

F.3d 492, 495, 497 (2d Cir. 1996) (finding duty not satisfied where attorney did not explain the actual impact of a plea offer). Courts have found that deficient advice can render a defendant's plea involuntary or unintelligent. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970). If counsel's deficient advice renders a plea involuntary or unintelligent, then it meets *Strickland*'s first prong of objectively unreasonable performance.

In this case, Defendant's plea was unintelligent for two reasons. First, she was not provided with all of the critical information regarding the immigration consequences of the plea, as explained *supra*. Second, the advice that defense counsel did offer was not effectively communicated. Defense counsel failed to explain basic concepts critical to her understanding of the charges against her and the decision whether to accept the plea. Moreover, there is nothing in the record that indicates defense counsel took steps to ascertain Ms. Olivares Castaneda's mental capacity, despite clear indications of potential mental deficiency.

It should be noted that Ms. Olivares Castaneda's present counsel inquired but availability of indigent funds was denied for a psychological evaluation. Ms. Olivares Castaneda does not have the resources to pay for an evaluation, which is typically $1,500-2,000. As such, an evidentiary hearing should be granted to develop the record and facilitate a determination of whether counsel's failure to notice Ms. Olivares

Castaneda's apparent intellectual limitations constitutes ineffective assistance of counsel.

5. Defendant suffered prejudice due to counsel's deficient performance.

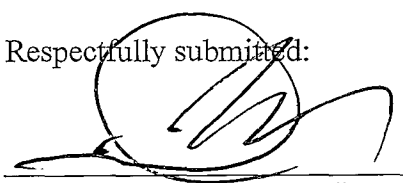
Had Defendant understood the nature of criminal proceedings and the immigration consequences of the plea, she would not have plead guilty to Theft in the Second Degree—Welfare Fraud. Subsequent to the plea, defendant was placed in removal proceedings, and ICE is asserting that she is ineligible for Cancellation of Removal based on the conviction for welfare fraud. Thus, she has suffered prejudice due to defense counsel's ineffective assistance of counsel.

D. CONCLUSION

Based on the arguments herein, the record, and on the arguments previously advanced by Ms. Olivares Castaneda in the lower court, the defendant's personal restraint petition should be granted and the court should either allow withdrawal of the plea and vacate the judgment and sentence or remand the matter for an evidentiary hearing to facilitate determination of the factual issues.

DATED this 1st day of May, 2015.

Respectfully submitted:



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Counsel for the Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent, vs. ALICIA OLIVARES CASTANEDA, Appellant.	NO. 46845-5-II-II PETITIONER'S REPLY TO STATE'S RESPONSE BRIEF CERTIFICATE OF SERVICE

I hereby certify that on this 4 day of May, 2015, I delivered a copy of the foregoing PETITIONER'S REPLY TO STATE'S RESPONSE BRIEF and attached APPENDIX

[X] by electronic service,
[ ] by hand delivery, and/or
[ ] facsimile

to the following person at the address listed below:

Anthony F. Golik
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DATED this 4 day of May, 2015.

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NO. 46845-5-II-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ALICIA OLIVARES CASTANEDA, Petitioner

CLARK COUNTY SUPERIOR COURT CASE NO. 13-1-00678-2

APPENDIX TO
PETITIONER'S REPLY TO STATE'S RESPONSE BRIEF: EXHIBITS

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UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge
Portland, Oregon

In the Matters of:	IN REMOVAL PROCEEDINGS
VICTORIANO CASTANEDA, Felipe,	A206-547-725
OLIVARES VAZQUEZ, Alicia,	A206-547-726
Respondents.	Immigration Judge: Andrea Sloan
	Individual Hearing: August 31, 2017

DEPARTMENT OF HOMELAND SECURITY
MOTION TO PRETERMIT EOIR-42B APPLICATION

The Department of Homeland Security ("DHS") hereby moves to pretermit the respondents' applications for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act ("Act" or "INA"). The respondents are ineligible for cancellation of removal because they have been convicted of a crime involving moral turpitude ("CIMT"), Theft in the Second Degree – Welfare Fraud, which is a disqualifying offense for cancellation of removal.

I. STATEMENT OF THE CASE

The respondents are married natives and citizens of Mexico who were placed in removal proceedings with Notices to Appear issued on May 15, 2014 and May 19, 2014, respectively. Exh. 1. DHS charged the respondents with removability pursuant to section 212(a)(6)(A)(i) of the Act, in that they are aliens present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General. Exh. 1.

The respondents came to the attention of DHS due to their criminal conviction. Exh. 2 at 4. On July 11, 2013 and July 25, 2013, respectively, the respondents were convicted of Theft in the Second Degree – Welfare Fraud, a Class C felony, in violation of the Revised Code of Washington ("RCW") sections 9A.08.020(3) (liability for the conduct of another – complicity); 74.08.331 (unlawful practices – obtaining assistance – disposal of realty – penalties); and 9A.56.040(1)(a) (theft in the second degree – other than firearm or motor vehicle), for which they were each sentenced to 30 days jail. Exh. 2 at 6-28; Exh. 2 at 5-41.

At a master calendar hearing on October 6, 2014, the respondent wife, by and though counsel, admitted the allegations and conceded the charge of removability. At a master calendar hearing on November 24, 2014, the court consolidated the cases, and the respondent husband, by

and through counsel, admitted the allegations and conceded the charge of removability. Both respondents seek cancellation of removal for certain nonpermanent residents, as well as asylum, withholding of removal, and protection under the Convention Against Torture. DHS submits that the respondents are ineligible for cancellation of removal because their conviction for Theft in the Second Degree – Welfare Fraud is a CIMT and a disqualifying offense.

II. ARGUMENT

Neither the Ninth Circuit nor the Board of Immigration Appeals has directly addressed whether a conviction under the respondent's statute of conviction is a crime involving moral turpitude. Therefore, the court must determine whether the respondents' conviction for Theft in the Second Degree – Welfare Fraud qualifies as a crime involving moral turpitude by applying the two-step categorical approach set forth in *Taylor v. United States*, 495 U.S. 575, 602 (1990). *See Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013); *Olivas-Motta*, 746 F.3d 907 (9th Cir. 2013). The court must identify and compare the elements of the statute of conviction with the elements of the federal generic definition of the crime to determine if the statute of conviction categorically fits within the generic definition of the offense listed in the Act. *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1208 (9th Cir. 2013); *see Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013). If the statute of conviction has the same elements as or defines the crime more narrowly than the generic offense, the conviction may serve as a predicate offense for immigration purposes. *Descamps*, 133 S.Ct. at 2283. If, on the other hand, the statute of conviction "sweeps more broadly than the generic crime," the respondents' conviction may not categorically serve as a predicate offense. *Id.*

In a "narrow range of cases" the court may proceed to the modified categorical approach. *Id.* (citing *Taylor*, 495 U.S. at 602). When a statute of conviction expressly lists alternative

elements in the disjunctive or provides alternative subsections, and at least one of the alternative elements/subsections matches the generic definition, the court may examine a narrow set of documents to determine under which statutory phrase the respondent was convicted. *Id.* at 2285 (describing the modified categorical approach's role as identifying "from among several alternatives, the crime of conviction so that the court can compare it to the generic offense"). The Ninth Circuit recently clarified that an "element" is a substantive component of the statute on which the jury must unanimously agree, whereas a "means" is a fact or method of committing an offense on which a jury need not agree yet still convict. *See Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014) (citing *United States v. Richardson*, 526 U.S. 813, 815 (1999)).

The Act does not define a "crime involving moral turpitude." The Ninth Circuit has determined that there are essentially two types of crimes involving moral turpitude: those involving fraud and those involving conduct that: (1) is vile, base, or depraved; and (2) violates accepted moral standards." *Castrijon-Garcia*, 704 F.3d at 1212; *Matter of Franklin*, 20 I&N Dec. 867, 868-69 (BIA 1994) ("Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.").

The federal generic definition of a CIMT is a crime involving fraud or conduct that: (1) is vile, base, or depraved; and (2) violates accepted moral standards. *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010). "Crimes involving fraud are considered to be crimes involving moral turpitude." *Tijani v. Holder*, 628 F.3d 1071, 1075-79 (9th Cir. 2010) (conviction for using false statements to obtain credit cards in violation of California law was inherently fraudulent). *See also Ibarra-Hernandez v. Holder*, 770 F.3d 1280, 1281-82 (9th Cir. 2014) (*per curiam*) (under modified categorical approach, violation of Arizona Revised Statutes § 13-

2008(A) was a crime involving moral turpitude because stealing a real person's identity for the purpose of obtaining employment is inherently fraudulent); *Espino-Castillo v. Holder*, 770 F.3d 861, 864 (9th Cir. 2014) (Arizona's conviction for forgery was a crime involving moral turpitude); *Hernandez de Martinez v. Holder*, 770 F.3d 823 (9th Cir. 2014) (*per curiam*) (conviction for criminal impersonation by assuming a false identity with intent to defraud is categorically a crime involving moral turpitude); *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011) ("crimes that have fraud as an element ... are categorically crimes involving moral turpitude").

According to the Ninth Circuit:

> The law is that "to be inherently fraudulent, a crime must involve knowingly false representation to gain something of value." *Navarro–Lopez v. Gonzales,* 503 F.3d 1063, 1076 (9th Cir. 2007) (*en banc*). Fraud is implicit in the nature of a crime under section 532a(1). The statute of conviction does not explicitly list intent to defraud as an element. But we have held that "[e]ven if intent to defraud is not explicit in the statutory definition, a crime nevertheless may involve moral turpitude if such intent is implicit in the nature of the crime." *Carty v. Ashcroft,* 395 F.3d 1081, 1084 (9th Cir. 2005).

Tijani v. Holder, 628 F.3d 1071, 1075-76 (9th Cir. 2010)

The respondents were convicted of Theft in the Second Degree – Welfare Fraud, a Class C felony, in violation of RCW §§ 9A.08.020(3) (liability for the conduct of another – complicity); 74.08.331 (unlawful practices – obtaining assistance – disposal of realty – penalties); and 9A.56.040(1)(a) (theft in the second degree – other than firearm or motor vehicle). Exh. 2 at 6-28; Exh. 2 at 5-41. DHS concedes that theft under RCW § 9A.56.040 is not a CIMT, as Washington courts have interpreted the statute to not require a permanent intent to deprive. *See Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009) (receipt of stolen property is not categorically a CIMT since the statute does not require a permanent intent to deprive); *State v. Komok*, 783 P.2d 1061 (Wash. 1989) (*en banc*); *State v. Trepanier*, 858 P.2d 511 (Wash.Ct.App. 1993); *State v. Crittenden*, 189 P.3d 849 (Wash.Ct.App. 2008).

However, the statute at issue in this case for purposes of determining a crime involving moral turpitude is RCW § 74.08.331. That statute of conviction states:

> 74.08.331. Unlawful practices – Obtaining assistance – Disposal of realty – Penalties
>
> (1) Any person who by means of a willfully false statement, or representation, or impersonation, or a willful failure to reveal any material fact, condition, or circumstance affecting eligibility or need for assistance, including medical care, surplus commodities, and food stamps or food stamp benefits transferred electronically, as required by law, or a willful failure to promptly notify the county office in writing as required by law or any change in status in respect to resources, or income, or need, or family composition, money contribution and other support, from whatever source derived, including unemployment insurance, or any other change in circumstances affecting the person's eligibility or need for assistance, or other fraudulent device, obtains, or attempts to obtain, or aids or abets any person to obtain any public assistance to which the person is not entitled or greater public assistance than that to which he or she is justly entitled is guilty of theft in the first degree under RCW 9A.56.030 and upon conviction thereof shall be punished by imprisonment in a state correctional facility for not more than fifteen years.
> (2) Any person who by means of a willfully false statement or representation or by impersonation or other fraudulent device aids or abets in buying, selling, or in any other way disposing of the real property of a recipient of public assistance without the consent of the secretary is guilty of a gross misdemeanor and upon conviction thereof shall be punished by imprisonment for not more than one year in the county jail or a fine of not to exceed one thousand dollars or by both.

RCW § 74.08.331 (2009) (Attachment 1).

DHS asserts that this statute is categorically a crime involving moral turpitude, as all subsections of the statute involve fraud, fraud is implicit in the nature of the crime, and the crime involves knowingly false representation to gain something of value. The statute does not describe several separate and distinct offenses, but rather sets forth the different means by which the single offense of fraudulently obtaining public assistance to which one is not entitled may be committed. *State v. Arndt*, 87 Wash.2d 374 (Wash. 1976) (*en banc*).

> As stated in *State v. Walters*, 8 Wash.App. 706, 713 (1973), criminal liability under RCW 74.08.331 follows when one obtains public assistance by means of: (1) a willfully false statement, (2) a willful failure to reveal what is required by law to be revealed, (3) a willful failure to promptly notify the department of those changes of which and in the manner the department is required by law to be notified, or (4) other fraudulent device.

Id. at 384.

According to the Washington Pattern Jury Instructions, the elements of the statute are:

(1) That between (date) and (date), the defendant *[obtained] [or] [attempted to obtain] [aided another person to obtain]* public assistance to which the *[defendant] [other person]* was not entitled or greater public assistance than that to which the *[defendant] [other person]* was justly entitled;
(2) That the defendant did so by means of [a willfully false statement or representation *[or impersonation]*] *[or] [a willful failure to reveal a material fact, condition or circumstance affecting eligibility or need for assistance] [or] [a willful failure to promptly notify the county office of public assistance in writing of a change in status or circumstance affecting eligibility or need for public assistance] [or]* [*[a] [other]* fraudulent device];
(3) That the public assistance to which the *[defendant] [other person]* was not entitled *[exceeded $1,500 in value]* [exceeded $250 in value *[but did not exceed $1,500 in value]] [did not exceed $250 in value] [was of some value]*;] and
(4) That any of these acts occurred in the State of Washington.

WPIC70.16 Theft – Public Assistance Fraud – Elements (2008) (Attachment 2).

The Ninth Circuit has held that "to be inherently fraudulent, a crime must involve knowingly false representation to gain something of value." *Navarro–Lopez v. Gonzales,* 503 F.3d 1063, 1076 (9th Cir. 2007) (*en banc*). The requisite mental state for acting willfully is acting knowingly. *State v. Delcambre,* 116 Wash.2d 444, 450-51 (Wash. 1991) (*en banc*). All of the means of committing the crime of RCW § 74.08.331 involve a knowing false representation or a knowing failure to reveal a material fact in order to gain something of value. As such, this statute meets the definition of a crime involving moral turpitude.

Washington courts have held that RCW § 74.08.331 incorporates the degrees of theft and those penalties, but it does not incorporate any other elements from the theft statute, such as intent to deprive. *State v. Campbell,* 125 Wash.2d 797, 803-04 (Wash. 1995) (citing *State v. Delcambre,* 116 Wash.2d 444-445, 551 (Wash. 1991)).

> Welfare fraud is a substantive crime separate from the types of theft defined in RCW 9A.56.020. It contains its own scienter element and means of committing the offense. Only its penalty is determined by reference to the theft provisions.
> *Delcambre,* at 451, 805 P.2d 233 (overruling *State v. Tyler,* 47 Wash.App. 648, 736 P.2d 1090 (1987)).

State v. Campbell, 125 Wash. 2d 797, 803-04 (Wash. 1995).

Because the respondents' conviction is a CIMT, they are ineligible for cancellation of removal. To be eligible for cancellation of removal, an applicant must meet the following requirements:

> (A) be physically present in the U.S. for ten years or more immediately preceding the date of application;
> (B) be a person of good moral character during such period;
> (C) have not been convicted of an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3);
> (D) establish that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a citizen of the U.S. or an alien lawfully admitted for permanent residence.

INA § 240A(b)(1).

The respondents' conviction for Theft in the Second Degree – Welfare Fraud is a disqualifying offense as a CIMT. The respondents are unable to benefit from the petty offense exception because their conviction is a CIMT described under sections 212 and 237 of the Act[1]. The petty offense exception does not apply to CIMTs described in section 237(a)(2). *See Matter of Almanza,* 24 I&N Dec. 771 776 (BIA 2009); *Matter of Cortez,* 25 I&N Dec. 301 (BIA 2010).

III. CONCLUSION

For the foregoing reasons, DHS respectfully asserts that the respondents are ineligible for cancellation of removal under section 240A(b)(1) and requests that the applications be pretermitted by the court. The respondents remain eligible to pursue their asylum applications.

[1] Theft in the Second Degree – Welfare Fraud is a Class C Felony, which carries a maximum sentence of five years. RCW § 9A.20.021(1)(c).

Dated: April 15, 2015

Respectfully submitted,

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Assistant Chief Counsel
Immigration and Customs Enforcement

West's RCWA 74.08.331

West's Revised Code of Washington Annotated Currentness

Title 74. Public Assistance (Refs & Annos)

Chapter 74.08. Eligibility Generally—Standards of Assistance (Refs & Annos)

74.08.331. Unlawful practices—Obtaining assistance—Disposal of realty—Penalties

(1) Any person who by means of a willfully false statement, or representation, or impersonation, or a willful failure to reveal any material fact, condition, or circumstance affecting eligibility or need for assistance, including medical care, surplus commodities, and food stamps or food stamp benefits transferred electronically, as required by law, or a willful failure to promptly notify the county office in writing as required by law or any change in status in respect to resources, or income, or need, or family composition, money contribution and other support, from whatever source derived, including unemployment insurance, or any other change in circumstances affecting the person's eligibility or need for assistance, or other fraudulent device, obtains, or attempts to obtain, or aids or abets any person to obtain any public assistance to which the person is not entitled or greater public assistance than that to which he or she is justly entitled is guilty of theft in the first degree under RCW 9A.56.030 and upon conviction thereof shall be punished by imprisonment in a state correctional facility for not more than fifteen years.

(2) Any person who by means of a willfully false statement or representation or by impersonation or other fraudulent device aids or abets in buying, selling, or in any other way disposing of the real property of a recipient of public assistance without the consent of the secretary is guilty of a gross misdemeanor and upon conviction thereof shall be punished by imprisonment for not more than one year in the county jail or a fine of not to exceed one thousand dollars or by both.

CREDIT(S)

[2003 c 53 § 368, eff. July 1, 2004; 1998 c 79 § 16; 1997 c 58 § 303; 1992 c 7 § 59; 1979 c 141 § 329; 1965 ex.s. c 34 § 1.]

HISTORICAL AND STATUTORY NOTES

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Short title—Part headings, captions, table of contents not law—Exemptions and waivers from federal law—Conflict with federal requirements—Severability—1997 c 58: See RCW 74.08A.900 through 74.08A.904.

Laws 1992, ch. 7, § 58, near the end of the first paragraph, substituted "a state correctional facility" for "the state penitentiary"; made the section gender neutral; and made nonsubstantive grammatical changes.

Laws 1997, ch. 58, § 303, near the beginning of the first paragraph, substituted "or need for assistance" for "of or need for assistance"; and inserted "including unemployment insurance," following "from whatever source derived,".

Laws 1998, ch. 79, § 16, toward the beginning of the first paragraph, following "surplus commodities" substituted ", and food stamps or food stamp benefits transferred electronically" for " and food stamps".

2003 Legislation

Laws 2003, ch. 53 reorganized criminal provisions in order to clarify and simplify the identification and referencing of crimes.

Laws 2003, ch. 53, § 1 provides:

Attachment 1 9

"The legislature intends by this act to reorganize criminal provisions throughout the Revised Code of Washington to clarify and simplify the identification and referencing of crimes. It is not intended that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington."

CROSS REFERENCES

Other crimes and offenses, see §§ 74.04.300, 74.08.055.

LIBRARY REFERENCES

2001 Main Volume

Agriculture ⚭2.6(5).
Larceny ⚭23.
Social Security and Public Welfare ⚭18.
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C.J.S. Agriculture §§ 28 to 29.
C.J.S. Larceny § 60.

RESEARCH REFERENCES

ALR Library

21 ALR 180, False Pretense: Presentation of and Attempt to Establish Fraudulent Claim Against Governmental Agency.

Treatises and Practice Aids

11A Wash. Prac. Series WPIC 70.15, Theft—Public Assistance Fraud—Definition.

11A Wash. Prac. Series WPIC 70.16, Theft—Public Assistance Fraud—Elements.

11A Wash. Prac. Series WPIC 70.17, Theft—Public Assistance Fraud—Duty to Notify.

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1. Validity

Where this section required department of social and health services to follow general provisions of Administrative Procedure Act (§ 34.04.010 et seq.), including notice and hearing requirements and provision for judicial review, statute did not constitute unconstitutional delegation of legislative authority by permitting department to promulgate regulations in regard to definition of income "consistent with federal requirements," especially where knowledge of specific amount of overpayment of welfare benefits was not element of offense of theft in violation of this section. State v. Holmes (1983) 98 Wash.2d 590, 657 P.2d 770. Constitutional Law ⚿ 2427(1); Social Security And Public Welfare ⚿ 1.1; Social Security And Public Welfare ⚿ 18

Inability of recipient to determine exact amount of his AFDC grant after receiving and willfully failing to report income did not make this section unduly vague, especially where knowledge of specific amount of overpayment was not element of offense of theft in violation of this section. State v. Holmes (1983) 98 Wash.2d 590, 657 P.2d 770. Social Security And Public Welfare ⚿ 1.1; Social Security And Public Welfare ⚿ 18

This section which required recipients to know that public assistance grants were dependent on such things as "eligibility," "need," "resources," and "income" was not, considered in its entirety, unconstitutionally vague. State v. Holmes (1983) 98 Wash.2d 590, 657 P.2d 770. Social Security And Public Welfare ⚿ 1.1

Where AFDC recipients' actions in willfully failing to report income from employment was within "hard core" of conduct clearly prohibited by this section, statute would not be held unconstitutionally vague. State v. Holmes (1983) 98 Wash.2d 590, 657 P.2d 770. Social Security And Public Welfare ⚿ 1.1

Statutes which require one seeking certain benefits, privileges, licenses, or certificates of status from governmental agency to supply particular information under criminal sanctions, including this statute relating to welfare fraud, do not violate constitutional privileges against compulsory self-incrimination. State v. Knowles (1971) 79 Wash.2d 835, 490 P.2d 113.

Provision of this section, which declares it felony to obtain public assistance by means of fraud and deceit, is not unconstitutionally vague or uncertain. State v. Knowles (1971) 79 Wash.2d 835, 490 P.2d 113.

2. In general

This section does not describe several separate and distinct offenses but rather sets forth the different means by which the single offense of fraudulently obtaining public assistance to which one is not entitled may be committed. State v. Arndt (1976) 87 Wash.2d 374, 553 P.2d 1328.

3. Construction with other laws—In general

Provision of § 74.04.300, providing that if any part of any assistance payment is obtained by person as result of wilfully false statement, or representation, or impersonation, or other fraudulent device, or wilful failure to reveal resources or income, 125% of amount of assistance to which he was not entitled shall be debt due state, provides remedial, rather than punitive sanction,

and is separate and distinct from provision of this section defining fraudulent receipt of public assistance as grand larceny and imposing criminal penalties therefor. Beckett v. Department of Social and Health Services (1976) 87 Wash.2d 184, 550 P.2d 529. Social Security And Public Welfare ⚿ 11

Senior Citizens' Grants Act of 1941 did not supplant the entire subject matter of 1935 act relating to old-age assistance; and 1941 act, which did not prescribe penalties for fraudulently obtaining old-age assistance, did not operate to repeal by implication RRS § 9998-20 (repealed), which did prescribe such penalties. State v. Becker (1951) 39 Wash.2d 94, 234 P.2d 897.

Crime of fraudulently obtaining public assistance as chargeable under this section rather than § 9.54.010 (repealed; see, now, § 9A.56.100). Op.Atty.Gen.1955-57, No. 123.

4. —— Conformity with federal law, construction with other laws

State law, requiring that sums of money received by food stamp recipient and his household from asparagus crops grown on their property and from time loss compensation paid recipient by state be considered in determining recipient's eligibility for food stamp program, was not inconsistent with applicable federal regulations. State v. Jeske (1976) 87 Wash.2d 760, 558 P.2d 162. Agriculture ⚿ 2.6(2)

5. Delegation of authority to define crime

Where recipients of AFDC benefits who were convicted of theft in violation of this section willfully failed to comply with statutory, rather than regulatory or administrative, disclosure requirements, there was no unconstitutional delegation of authority to department of social and health services which would bar their conviction. State v. Holmes (1983) 98 Wash.2d 590, 657 P.2d 770. Constitutional Law ⚿ 2427(1)

Where legislature provided standards for department of social and health services to follow as to grants, budgetary guidelines, and eligibility requirements for public assistance, and provided procedural safeguards against arbitrary action by department, department's authority to determine what assistance individual was "justly entitled" to in regard to crime of theft in violation of this section was not improper delegation of legislative authority. State v. Holmes (1983) 98 Wash.2d 590, 657 P.2d 770. Constitutional Law ⚿ 2427(1); Social Security And Public Welfare ⚿ 1.1

Although defendant could be civilly liable for public assistance overpayments to her, criminal charges could not be based on administrative eligibility regulations of the department of social and health services, in that no standards to define what was to be done and no procedural safeguards to control arbitrary administrative action were provided for in provision of this section governing disclosures "required by law" to justify delegation of the authority to define crimes to the department. State v. Ermert (1980) 94 Wash.2d 839, 621 P.2d 121. Social Security And Public Welfare ⚿ 18

6. Double jeopardy

Since proceedings instituted by department of social and health services to levy fraudulent overpayment against recipient of public assistance funds under aid to dependent children program for alleged fraudulent receipt of public assistance money, under § 74.04.300 permitting same, are civil and not criminal in nature, they were not barred by doctrine of double jeopardy by virtue of recipient's prior acquittal in criminal proceeding arising out of same factual circumstances. Beckett v. Department of Social and Health Services (1976) 87 Wash.2d 184, 550 P.2d 529. Double Jeopardy ⚿ 23

7. Due process and equal protection

The elements required for the felony offense of unlawful obtaining of assistance under this section are not identical to those of the gross misdemeanor of swearing falsely in an application for an immediate grant under § 74.04.250 or the felony of falsely verifying an application for assistance under § 74.08.055; hence, the existence of different punishments for each crime and prosecutorial discretion to charge under more than one of the statutes in certain circumstances do not violate equal protection rights. State v. Bailey (1976) 14 Wash.App. 748, 544 P.2d 778.

8. Res judicata and collateral estoppel

Department of Social and Health Service (DSHS) and prosecutor's office were in privity for purposes of determining whether administrative hearing on recoupment of overpayment of food stamps, financial assistance, and medical assistance had collateral estoppel effect on prosecution for welfare fraud; both prosecutor's office and DSHS represented state. State v. Williams (1997) 132 Wash.2d 248, 937 P.2d 1052. Administrative Law And Procedure ⚿ 501; Agriculture ⚿ 2.6(4); Social Security And Public Welfare ⚿ 8.15

Applying doctrine of collateral estoppel to bar prosecution for welfare fraud (first-degree theft) would work injustice following administrative determination that recipient did not intentionally receive overpayment of food stamps, financial assistance, and medical assistance; allowing administrative proceeding to bar criminal action would result in longer administrative hearings and greater delay since state would be required to marshal prosecution's potential witnesses and evidence at administrative level, and state would likely consider foregoing administrative hearings even though such hearing is allowed to recoup financial losses. State v. Williams (1997) 132 Wash.2d 248, 937 P.2d 1052. Administrative Law And Procedure ⚿ 501; Agriculture ⚿ 2.6(4); Social Security And Public Welfare ⚿ 8.15

Collateral estoppel did not bar department of social and health services from assessing fraudulent overpayment for alleged fraudulent receipt of public assistance monies under aid for dependent children program, despite recipient's acquittal in prior criminal proceeding arising out of same factual circumstances, where there was no concurrence of identity of two causes of action in that two proceedings required different burdens of proof. Beckett v. Department of Social and Health Services (1976) 87 Wash.2d 184, 550 P.2d 529. Judgment ⚿ 559

9. Grand larceny and theft—In general

Administrative decisions on issue whether recipient willfully or knowingly intended to receive food stamps, financial assistance, and medical assistance presented same issue, under doctrine of collateral estoppel, as prosecution for welfare fraud (first-degree theft); both administrative hearing and criminal trial focused on issue of mens rea in obtaining excess benefits. State v. Williams (1997) 132 Wash.2d 248, 937 P.2d 1052. Administrative Law And Procedure ⚿ 501; Agriculture ⚿ 2.6(4); Social Security And Public Welfare ⚿ 8.15

Crime of welfare fraud is now a theft, the degree of which depends upon monetary amounts involved. State v. Delcambre (1991) 116 Wash.2d 444, 805 P.2d 233. Social Security And Public Welfare ⚿ 18

Crime of grand larceny, within purview of this section, has been abrogated and replaced by theft. State v. Sass (1980) 94 Wash.2d 721, 620 P.2d 79. Social Security And Public Welfare ⚿ 18

10. —— Degree of offense, grand larceny and theft

In determining which degree of theft is applicable to grand larceny offense as defined by this section, value of items stolen is taken into account. State v. Sass (1980) 94 Wash.2d 721, 620 P.2d 79. Social Security And Public Welfare ⚿ 18

11. Fraud, generally

A "fraudulent device" ordinarily imports a plan, project, scheme, or artifice devised by design to trick or deceive, whereas "fraud" is a less specific concept which may encompass an intentional misrepresentation of a material, existing fact that is relied upon in good faith by another to his damage. Bazan v. Department of Social and Health Services (1980) 26 Wash.App. 16, 612 P.2d 413, review granted, dismissed. Fraud ⚿ 3

Fraud may be the willful concealment of a material fact one is bound to disclose in good faith. Bazan v. Department of Social and Health Services (1980) 26 Wash.App. 16, 612 P.2d 413, review granted, dismissed. Fraud ⚿ 17

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Standing alone, a willfully false statement, representation, or impersonation ordinarily connotes fraud, rather than a thought-out plan to deceive. Bazan v. Department of Social and Health Services (1980) 26 Wash.App. 16, 612 P.2d 413, review granted, dismissed. Fraud ⚿ 9

12. Disposal of realty

Sale or disposal of recipient's property. Op.Atty.Gen.1939-40, p. 67.

13. Income and resources

Husband's obligation to support his wife and children, from whom he had separated, was at best an inchoate right requiring court intervention before wife had a legal interest in the funds rising to level of "income" for purpose of welfare fraud conviction based on failure to report that portion of husband's separate property, specifically, veterans' educational benefits attributable to premarital military service, which husband had forwarded to wife for specific purpose of acquiring tools so that husband could start furniture business on his release from prison. State v. Wallace (1982) 97 Wash.2d 846, 651 P.2d 201. Social Security And Public Welfare ⚿ 18

Disability payments received for permanent partial disability under workmen's compensation act were "income" for purposes of provision of this section governing determination of eligibility for food stamps, and thus defendant, who failed to report as income such disability payments upon application for food stamps, was guilty of welfare fraud. State v. Sass (1979) 24 Wash.App. 289, 600 P.2d 688, review granted, remanded 94 Wash.2d 721, 620 P.2d 79. Fraud ⚿ 68.10(1); Social Security And Public Welfare ⚿ 18

14. Notification of change in circumstances

Evidence did not sustain conviction for first-degree theft by welfare fraud on theory of principal liability; although it was assumed that defendant did not comply with duty to notify Department of Social and Health Services (DSHS) within 20 days of receipt or possession of all income or resources not previously declared to department, there was no evidence that defendant read or signed form titled "Your Rights and Responsibilities," that he read or signed change of circumstances and monthly report forms that were mailed to family home, that DSHS ever informed him of his duty in any other way, or that he had independent knowledge of the law. State v. LaRue (1994) 74 Wash.App. 757, 875 P.2d 701. Social Security And Public Welfare ⚿ 18

A public assistance recipient, who failed to notify the department of social and health services of a change in circumstances affecting eligibility, was nevertheless entitled to have the department, in calculating the amount of her food stamp overpayment, consider her eligibility for nonassistance food stamps. Bazan v. Department of Social and Health Services (1980) 26 Wash.App. 16, 612 P.2d 413, review granted, dismissed. Agriculture ⚿ 2.6(1)

A public assistance recipient meets his affirmative duty under this section and § 74.04.300 to report any change in his circumstances when he actually notifies the state of any change within the required time period, regardless of the circumstances of such notification or the recipient's motivation in giving it. State v. Vanderburg (1976) 14 Wash.App. 738, 544 P.2d 1251.

Under § 74.04.300 and WAC 388-28-355, which relate to the duty of a welfare recipient to give notice of certain changes in income and resources, not all changes in status affecting eligibility or need are required to be reported or declared. Hence, when an assumptive spouse moves into a household, it is not necessarily a change "required by law" to be revealed to the department within the meaning of provision of this section dealing with fraudulent obtaining of assistance. State v. Walters (1973) 8 Wash.App. 706, 508 P.2d 1390.

15. Accomplice liability

Person is liable as principal in commission of crime of theft by welfare fraud if he or she obtains or attempts to obtain public assistance to which he or she is not entitled, by one or more of means stated; person is liable as accomplice if he or she aids or

abets another in doing the same. State v. LaRue (1994) 74 Wash.App. 757, 875 P.2d 701. Social Security And Public Welfare ⚿ 18

Evidence did not sustain conviction for first-degree theft by welfare fraud on theory of accomplice liability; fact that defendant admitted signing application for assistance form and that he did not report his income while out of the family home was insufficient to support reasonable inference that defendant knew of his wife's crime, or that he desired to facilitate it. State v. LaRue (1994) 74 Wash.App. 757, 875 P.2d 701. Social Security And Public Welfare ⚿ 18

16. Indictment or information

Information did not allege amount of overpayment obtained by charged welfare fraud, even under liberal standard of construction applicable to challenge first raised on appeal, and thus, information was constitutionally insufficient for failing to state essential elements of charged welfare fraud. State v. Campbell (1995) 125 Wash.2d 797, 888 P.2d 1185. Social Security And Public Welfare ⚿ 18

Defendant was not convicted of offense involving food stamps and no instructions mentioned food stamps and, thus, information was not defective for failing to mention food stamps, even though evidence of food stamps was admitted at trial; information charged defendant with welfare fraud for unlawfully obtaining warrants and currency from Department of Public Assistance. State v. Campbell (1993) 69 Wash.App. 302, 848 P.2d 1292, reconsideration denied, review granted in part 122 Wash.2d 1015, 863 P.2d 1352, reversed 125 Wash.2d 797, 888 P.2d 1185. Social Security And Public Welfare ⚿ 18

Information charging welfare fraud in language of statute [RCWA 74.08.331], plus monetary amount involved to determine penalty, apprises defendant with reasonable certainty of charge against him. State v. Delcambre (1991) 116 Wash.2d 444, 805 P.2d 233. Indictment And Information ⚿ 104; Indictment And Information ⚿ 110(15)

Information charging theft in the first degree by means of welfare fraud did not need to allege "intent to deprive." State v. Delcambre (1989) 55 Wash.App. 681, 779 P.2d 1166, review granted 114 Wash.2d 1001, 788 P.2d 1078, affirmed 116 Wash.2d 444, 805 P.2d 233. Social Security And Public Welfare ⚿ 18

Defendant, charged with violating the welfare fraud statute, was not prejudiced by prosecution's midtrial amendment of the information which changed the applicable dates, where State had provided defendant with discovery outlining State's witness' testimony, much of which involved defendant's actions prior to dates stated in original information, and the amended information did not require defendant to defend against any additional allegations or rebut additional testimony. State v. Brisebois (1984) 39 Wash.App. 156, 692 P.2d 842, review denied. Criminal Law ⚿ 1167(4)

Information which charged that defendant by means of false statement or willful failure to reveal material fact, or circumstance affecting eligibility or need for assistance obtained food stamps to which he was not justly entitled was sufficient to appraise defendant that he was charged with knowing and willful failure to report so that failure to allege, in words of statute, that defendant's criminal omission consisted of failure to notify state agency of a change as "required by law" was not a defect vitiating the proceeding. State v. Jeske (1976) 87 Wash.2d 760, 558 P.2d 162. Indictment And Information ⚿ 71.4(4); Indictment And Information ⚿ 110(2)

Although official citation to administrative rules and regulations as well as statutes allegedly violated by defendant charged with grand larceny by welfare fraud in connection with receipt of food stamps was preferable, absent showing of prejudice, failure to include such citations in information did not require reversal of conviction. State v. Jeske (1976) 87 Wash.2d 760, 558 P.2d 162. Criminal Law ⚿ 1167(1)

Fact that information, which charged that defendant by means of willfully false statement or willful failure to reveal material fact, or circumstances affecting eligibility or need for assistance obtained food stamps to which he was not justly entitled, did not allege that defendant's criminal omission consisted of a failure to notify department of public assistance of a change as

"required by law" and so alert defense counsel to possible applicable federal law did not prejudice defense. State v. Jeske (1976) 87 Wash.2d 760, 558 P.2d 162. Criminal Law ⚿ 1167(1)

RRS § 9998-20 (repealed), which provided that any person who fraudulently obtained old-age assistance to which he was not entitled was guilty of misdemeanor, was not repealed either expressly or by implication, and was an exception to general larceny statute; hence, there was no statutory basis to support charge in an information for grand larceny by false representation in obtaining such assistance, and since such information charged defendant with commission of acts which amount to misdemeanor only, it was properly quashed by trial court. State v. Becker (1951) 39 Wash.2d 94, 234 P.2d 897.

17. Limitations

Three-year statute of limitations (§ 9A.04.080) applicable to theft did not bar prosecution for conduct of defendant, charged with violating the welfare fraud statute (this section), occurring more than three years before the information, where defendant did not claim that her crime was not continuous, and the crime was completed well within the statute of limitations. State v. Brisebois (1984) 39 Wash.App. 156, 692 P.2d 842, review denied. Criminal Law ⚿ 150

Where prosecution aggregated a systematic series of relatively minor transactions so as to allege commission of a single crime, that crime was continuous and not completed until continuing criminal impulse had been terminated, and thus state had right to charge defendant with events which occurred previous to three years before state filed original information charging her with theft in first degree by welfare fraud. State v. Carrier (1984) 36 Wash.App. 755, 677 P.2d 768. Criminal Law ⚿ 150

18. Elements

Crime of welfare fraud includes as essential element dollar amount of unlawfully obtained public assistance, in view of statute declaring that welfare fraud offenses be treated as thefts and classification of degrees of thefts dependent on value of property involved. State v. Campbell (1995) 125 Wash.2d 797, 888 P.2d 1185. Social Security And Public Welfare ⚿ 18

Amount of money obtained is not essential element of offense of welfare fraud and, thus, need not be charged, although amount must be proved to establish appropriate penalty under penalty provisions of theft statute; only penalty provisions of theft statute apply to offense of welfare fraud, not substantive elements of theft. State v. Campbell (1993) 69 Wash.App. 302, 848 P.2d 1292, reconsideration denied, review granted in part 122 Wash.2d 1015, 863 P.2d 1352, reversed 125 Wash.2d 797, 888 P.2d 1185. Social Security And Public Welfare ⚿ 18

RCWA 9A.56.100 providing that offenses defined as larceny elsewhere will be treated as thefts under theft statute [RCWA 9A.56.010 et seq.] does not make "intent to deprive" an essential element of welfare fraud merely because it is essential element of theft, but merely means that penalties of theft now apply to welfare fraud, and requisite mental state for welfare fraud remains knowledge; overruling *State v. Tyler*, 47 Wash.App. 648, 736 P.2d 1090. State v. Delcambre (1991) 116 Wash.2d 444, 805 P.2d 233. Social Security And Public Welfare ⚿ 18

Requirement of intent to deprive applies to crime of welfare fraud. State v. Tyler (1987) 47 Wash.App. 648, 736 P.2d 1090. Social Security And Public Welfare ⚿ 18

Information charging defendants with welfare fraud which failed to allege amount of public assistance unlawfully obtained charged only theft in the third degree, a gross misdemeanor. State v. Bryce (1985) 41 Wash.App. 802, 707 P.2d 694. Social Security And Public Welfare ⚿ 18

Food stamps are "public assistance" for purpose of charging a defendant with unlawfully obtaining assistance pursuant to provision of this section, providing that any person by means of a wilfully false statement, or a presentation, or impersonation or wilful failure to reveal any material fact, condition or circumstance affecting eligibility for assistance, including medical care, surplus commodities and food stamps shall be guilty of theft and for purpose of charging defendant under § 9A.56.030, defining theft in the first degree. State v. Farmer (1983) 100 Wash.2d 334, 669 P.2d 1240. Agriculture ⚿ 2.6(5)

A person must be aware that the reporting of income or resources is required by law and then fail to do so before the criminal mental element of welfare fraud statute can be satisfied. State v. Wallace (1982) 97 Wash.2d 846, 651 P.2d 201. Social Security And Public Welfare ⚿ 18

In prosecution for welfare fraud, trial court did not err in refusing to give a separate jury instruction regarding specific intent as an element of crime charged, since instruction submitted by court required state to prove "that the act was done with the intent to deprive or defraud another." State v. Jones (1979) 22 Wash.App. 506, 591 P.2d 816. Criminal Law ⚿ 829(3)

Under this section, which provides that it is a larcenous act to obtain public assistance to which one is not entitled by means of willfully failing to reveal facts or provide notice as required by law, the existence of an affirmative legal duty to reveal a fact or give notice is an essential element of the crime and must be charged as well as proven in a prosecution for violation of the statute. State v. Walters (1973) 8 Wash.App. 706, 508 P.2d 1390.

19. Burden of proof

State, in its prima facie case on a charge brought under the welfare fraud statute, must show that the defendant was ineligible only for specific program from which the defendant obtained income; however, once the defendant produces evidence of eligibility under another public assistance program, State bears burden of proving beyond a reasonable doubt that the defendant was not eligible for that program. State v. Brisebois (1984) 39 Wash.App. 156, 692 P.2d 842, review denied. Social Security And Public Welfare ⚿ 18

In prosecution for grand larceny in which it was alleged that defendant obtained public assistance to which she was not entitled by means of wilfully false statements, state was not required to prove defendant would not have received the same or lesser amount of public assistance under another category, in absence of sufficient evidence that defendant was eligible under another category. State v. Warren (1980) 25 Wash.App. 886, 611 P.2d 1308. Social Security And Public Welfare ⚿ 18

Fact that defendant, whose aid to dependent children regular grant was terminated for failure to notify department of social and health services of her remarriage, was determined to be eligible for another category of public assistance several months after her termination, was not sufficient evidence to require state to prove beyond a reasonable doubt that she was not eligible for such other category of public assistance or, if eligible, would have received a lesser amount, in grand larceny prosecution of defendant for obtaining public assistance to which she was not entitled by means of wilfully false statements. State v. Warren (1980) 25 Wash.App. 886, 611 P.2d 1308. Social Security And Public Welfare ⚿ 18

In a prosecution for grand larceny by welfare fraud in connection with receipt of food stamps, it is necessary to allege and prove not only that the fact which was not reported affected eligibility for program but also that it was required by law to be reported. State v. Jeske (1976) 87 Wash.2d 760, 558 P.2d 162. False Pretenses ⚿ 38

20. Sufficiency of evidence

Evidence, including defendant's physical presence in wife's home during time she collected state public assistance, was sufficient to establish that defendant participated, either as a principal or as an abettor, in crime of welfare fraud. State v. Matthews (1981) 28 Wash.App. 198, 624 P.2d 720. Fraud ⚿ 69(5)

Defendant had no "income or resources" that were not reported to the department of social and health services, in that there was no evidence presented that defendant's savings, and consequently her car, came from any source other than her public assistance payments, and thus defendant could not be convicted of crime of welfare fraud. State v. Ermert (1980) 94 Wash.2d 839, 621 P.2d 121. Social Security And Public Welfare ⚿ 18

Uncontradicted evidence that defendant made wilfully false statements and that she obtained an aid to families with dependent children regular grant for which she was not eligible because of her remarriage, constituted substantial evidence upon which trial court could find defendant guilty of grand larceny. State v. Warren (1980) 25 Wash.App. 886, 611 P.2d 1308. Social Security And Public Welfare ⚿ 18

21. Instructions

Defendant suffering from battered women's syndrome was entitled to duress instruction in prosecution for welfare fraud (first-degree theft), even though boyfriend was often at sea and even if he was unable to inflict immediate harm. State v. Williams (1997) 132 Wash.2d 248, 937 P.2d 1052. Criminal Law ⚿ 772(6)

Defendant had engaged in sophisticated and broad scheme of welfare fraud that involved numerous acts, but that was in continuing course of conduct in furtherance of single goal of unlawfully obtaining public assistance and, thus, state was not required to elect which act upon which it would base its case and trial court was not required to instruct jury that each juror had to agree that same underlying act had been proved beyond reasonable doubt. State v. Campbell (1993) 69 Wash.App. 302, 848 P.2d 1292, reconsideration denied, review granted in part 122 Wash.2d 1015, 863 P.2d 1352, reversed 125 Wash.2d 797, 888 P.2d 1185. Criminal Law ⚿ 678(1)

Giving of culpability instruction which could be construed as an unconstitutional mandatory presumption of culpability rather than a permissive presumption, in prosecution for welfare fraud where evidence against defendant was largely circumstantial, was not harmless error beyond a reasonable doubt and required reversal. State v. Matthews (1981) 28 Wash.App. 198, 624 P.2d 720. Criminal Law ⚿ 778(2); Criminal Law ⚿ 1172.2

In prosecution of public assistance recipient for welfare fraud, instructions, taken as a whole, properly informed jury that to convict it had to find that defendant obtained public assistance by means of wilfully false, statement or representation. State v. Ermert (1980) 25 Wash.App. 682, 611 P.2d 1286, review granted, reversed on other grounds 94 Wash.2d 839, 621 P.2d 121. Criminal Law ⚿ 822(6)

22. Sentence and punishment

Evidence supported exceptional sentence of four years and two months imprisonment for welfare fraud conviction even though no specific dollar amount obtained was charged; amounts obtained were far in excess of $1,500 necessary to make first-degree theft penalty applicable, and sentencing judge made unchallenged determination that restitution was payable in sum of $25,000. State v. Campbell (1993) 69 Wash.App. 302, 848 P.2d 1292, reconsideration denied, review granted in part 122 Wash.2d 1015, 863 P.2d 1352, reversed 125 Wash.2d 797, 888 P.2d 1185. Sentencing And Punishment ⚿ 820; Social Security And Public Welfare ⚿ 18

The court of appeals correctly determined that defendant, who was found guilty of grand larceny as defined by this section, should be punished for theft. State v. Sass (1980) 94 Wash.2d 721, 620 P.2d 79. Social Security And Public Welfare ⚿ 18

Later enacted statute, § 9A.56.100, providing that all offenses defined as larcenies outside of criminal code shall be treated as thefts, repealed by implication provision of portion of this section establishing welfare fraud penalty because it prescribed a different penalty for grand larceny. State v. Sass (1980) 94 Wash.2d 721, 620 P.2d 79. Social Security And Public Welfare ⚿ 18

Rule of lenity required imposition upon defendant, convicted of welfare fraud, of five-year maximum sentence, appropriate penalty for welfare fraud involving $314. State v. Sass (1980) 94 Wash.2d 721, 620 P.2d 79. Social Security And Public Welfare ⚿ 18

Provisions of this section, which provided that welfare fraud constituted grand larceny and was punishable by imprisonment for not more than 15 years were impliedly repealed by § 9A.56.100, which equated larceny with theft; therefore, welfare fraud of less than $250 was punishable as gross misdemeanor under § 9A.56.100. State v. Harvey (1980) 25 Wash.App. 392, 607 P.2d 875. Social Security And Public Welfare ⚿ 1.1

23. Harmless error

In prosecution for welfare fraud, trial court erred in submitting instruction which permitted jury to find defendants guilty of welfare fraud for wilfully failing to notify the department of social and health services of changes in status or circumstances,

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since there was no evidence of a change of circumstances; however, such error was harmless, since overwhelming documentary evidence, as well as defendants' own incriminating admissions at trial, left no reasonable doubt as to guilt under the other two modes submitted to jury. State v. Jones (1979) 22 Wash.App. 506, 591 P.2d 816. Criminal Law ⚷ 814(5); Criminal Law ⚷ 1172.6

24. Waiver

Defendant's plea of guilty to charge of crime of theft in first degree by welfare fraud waived any right to appeal from deficiency of state's proof of crime alleged. State v. Carrier (1984) 36 Wash.App. 755, 677 P.2d 768. Criminal Law ⚷ 1026.10(4)

Current with all 2008 legislation

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11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 70.16 (3d Ed)

Washington Practice Series TM
Washington Pattern Jury Instructions--Criminal
Database Updated December 2014
Washington State Supreme Court Committee on Jury Instructions
Part IX. Crimes Against Property
WPIC CHAPTER 70. Theft

WPIC 70.16 Theft—Public Assistance Fraud—Elements

To convict the defendant of the crime of theft in the *[first][second][third]* degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between (date) and (date), the defendant *[obtained][or][attempted to obtain][aided another person to obtain]* public assistance to which the *[defendant][other person]* was not entitled or greater public assistance than that to which the *[defendant][other person]* was justly entitled;

(2) That the defendant did so by means of [a willfully false statement or representation *[or impersonation]*] *[or][a willful failure to reveal a material fact, condition or circumstance affecting eligibility or need for assistance][or][a willful failure to promptly notify the county office of public assistance in writing of a change in status or circumstance affecting eligibility or need for public assistance][or]* [*[a][other]* fraudulent device];

[(3) That the public assistance to which the *[defendant][other person]* was not entitled *[exceeded $1,500 in value]* [exceeded $250 in value *[but did not exceed $1,500 in value]*] *[did not exceed $250 in value][was of some value]*;] and

[(4)] That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

NOTE ON USE

If more than one degree of theft is being submitted to the jury, a separate to-convict instruction for each degree is needed.

Use WPIC 4.11, Lesser Included Crime or Lesser Degree with this instruction, if more than one degree of theft is being submitted to the jury. If the case involves an attempt to obtain public assistance, a separate to-convict instruction may have to be drafted for the attempt because of the problem of proving the amount that defendant was attempting to obtain.

Use WPIC 19.08, Theft—Defense, with this instruction if the statutory defense is an issue supported by the evidence.

For a discussion of bracketed element (3) on value, see the Comment.

For a discussion of the phrase "any of these acts" in the jurisdictional element, see the Introduction to WPIC 4.20 and the Note on Use to WPIC 4.21, Elements of the Crime—Form.

Use WPIC 10.05, Willfully—Definition, with this instruction.

COMMENT

RCW 74.08.331.

Amount taken—Degree of theft. Since 2003, the statute has designated all violations of RCW 74.08.331 as first degree theft. Previously, the statute designated the offense more generally as grand larceny, which the courts had interpreted as incorporating the three degrees of theft, thus adding to the elements the value of the property at issue. See State v. Campbell, 125 Wn.2d 797, 888 P.2d 1185 (1995); State v. Bryce, 41 Wn.App. 802, 707 P.2d 694 (1985).

The 2003 amendment, thus, appears to abrogate the holdings in these cases, treating all violations as first degree theft, without regard to the actual dollar amount involved. Yet, the Legislature very likely did not intend this particular change. The 2003 amendment was part of an omnibus bill that amended a long list of criminal statutes for the purpose of using a consistent format; the bill expressly stated that there was no intent to make any substantive changes in the law. Laws of 2003, Chapter 53, §§ 1, 368. Thus, the 2003 amendment likely was adopted under the mistaken assumption that the statute was already limited to first degree theft.

Given the uncertainty surrounding this issue, the committee has bracketed the element addressing the value of the property. If the plain language of the 2003 amendment is given effect, then the element would be omitted.

Attachment 2 20

Definitions. A number of specific terms (such as public assistance, applicant, recipient, resource, and income) are defined in RCW 74.04.005. When necessary in a particular case, jury instructions should be adapted from this statute.

Alternative means. RCW 74.08.331, the welfare fraud statute, sets out alternative means of committing a single crime that are not repugnant to one another. When there is substantial evidence to support each of the alternative means, unanimity of the jury as to the mode of committing the crime is not required. The instruction may join the several modes by the word "or." State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976).

Constitutionality. The constitutionality of the underlying statute was upheld in State v. Holmes, 98 Wn.2d 590, 657 P.2d 770 (1983).

Duty to disclose. Failure to disclose a matter in obtaining public assistance constitutes a crime only if the matter is specifically required to be disclosed by statute. The duty to disclose cannot be imposed by administrative regulation. State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980). Also see State v. Wallace, 97 Wn.2d 846, 651 P.2d 201 (1982); State v. Matthews, 28 Wn.App. 198, 624 P.2d 720 (1981).

Defense. RCW 9A.56.020 sets forth a defense to a charge of theft if the property or service was appropriated openly and avowedly under a good claim of title. For a more detailed discussion of this defense, see the Comment to WPIC 19.08, Theft—Defense.

Intent. An intent to deprive is not an element of the crime of welfare fraud. State v. Campbell, 125 Wn.2d at 803. The requisite mental state for acting willfully is acting knowingly. State v. Delcambre, 116 Wn.2d 444, 805 P.2d 233 (1991).

The State was not collaterally estopped (on public policy grounds) from prosecuting a recipient for welfare fraud after an administrative determination that she had not acted with "willful or knowing intent." State v. Williams, 132 Wn.2d 248, 937 P.2d 1052 (1997) (case remanded for opportunity to instruct jury on duress defense).

[Current as of July 2008.]

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

I am a citizen of the United States over the age of 18 years and not a party to the within-entitled action. I am an employee of the U.S. Department of Homeland Security and my business address is 1220 SW Third Avenue, Suite 300, Portland, Oregon 97204.

☐ I served a true and correct copy of the foregoing document in person.

X I served a true and correct copy of the foregoing document by sending a true copy to him/her by regular mail, postage prepaid, to the following address:

Geoffrey Doolittle
Bailey Immigration, PC
4380 SW Macadam Avenue, Suite 150
Portland, OR 97239

DATED: April 15, 2015

Gina C. Emanuel

Gina C. Emanuel
Assistant Chief Counsel
Immigration and Customs Enforcement

SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. ALICIA OLIVARES CASTANEDA Defendant.	No. 13-1-00678-2 DECLARATION OF ANN E. BENSON

1. I, ANN E. BENSON, swear under penalty of perjury that the following facts are true and accurate:

2. I am a licensed attorney in the State of Washington. I am over the age of 18 and I am competent to testify to the matters set forth herein. I have practiced immigration law exclusively since 1992 and have developed a particular expertise in the immigration consequences of crimes since 1995. Since 1999 I have served as the Directing attorney of the Washington Defender Association's Immigration Project (WDA's Immigration Project).

3. Since its inception in 1999, WDA's Immigration Project, through funding provided by the legislature, has provided individual case assistance, practice advisories, online resources, and regular trainings to criminal defenders throughout Washington State. The purpose of our work is to assist criminal defenders to identify the immigration consequences associated with charges and plea offers, avoid or mitigate these consequences where possible in the course of

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their representation, and assist their noncitizen clients in making informed choices on the immigration consequences related to their criminal proceedings.

4. Since WDA's Immigration Project inception in 1999, WDA's Immigration Project staff, have been available to provide criminal defense attorneys with immigration expertise on individual cases. Any criminal defense attorney may contact Immigration Project staff and seek counsel as to the possible immigration consequences associated with a particular charge and/or plea offer. In these consultations we also provide defense counsel with best alternatives to negotiate resolutions that mitigate or avoid adverse immigration consequences.

5. Case consultations take, on average, 20 minutes of defense counsel's time and are provided at no charge to the defendant or defense counsel. Since 1999, WDA's Immigration Project staff, have advised defenders in over 22,000 individual cases, identifying immigration consequences and strategies to avoid them, and assisting defenders in advising their noncitizen clients to make informed decisions about resolving their criminal charges.

6. All Washington defenders also have free access to all of our practice advisories and materials on WDA's website (www.defensenet.org) that address immigration consequences of specific Washington crimes, including theft crimes. Additionally, WDA's Immigration Project staff have conducted over 150 trainings throughout Washington, including regular trainings in Clark County. These trainings educate defenders about the immigration consequences of Washington convictions, inform them about WDA's Immigration Project resources and help defenders ensure that they are complying with their duties under *Padilla v. Kentucky,* 130 S.Ct. 1476 (2010), and *State v. Sandoval*, 249 P.3d 1015 (2011).

7. In *Padilla*, the US Supreme Court held that effective assistance of counsel to a noncitizen defendant requires that defense counsel consult available resources to inform themselves of

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the immigration consequences of the charges and plea offers at stake, and provide the defendant with affirmative, accurate advice regarding these consequences. The Court has also made clear that defense counsel's duty includes ensuring that plea negotiations are informed by counsel's understanding of the immigration consequences at issue. *Padilla* at 1486. *See also, Lafler v. Cooper*, 132 S.Ct. 1376 (2012) (relying on *Padilla*). The Washington Supreme Court has made clear that facing deportation as a consequence of defense counsel's deficient performance with regard to immigration consequences constitutes prejudice. *Sandoval* at 1022. The *Sandoval* Court also expressly held that boilerplate advisal language in a plea statement regarding deportation, pursuant to RCW 10.40.200, does not satisfy defense counsel's Sixth Amendment duty to affirmatively provide effective assistance regarding immigration consequences as required by *Padilla*. *See Sandoval* at 1020-21.

8. I have reviewed the relevant criminal and immigration documents in relation to Ms. Alicia Olivares-Castaneda's criminal and immigration cases as provided to me by her attorney, Nicole Dalton. Ms. Olivares-Castaneda is a native and citizen of Mexico who has resided in the United States in 2001. She has four US citizen children.

9. On July 25 2013, Ms. Olivares-Castenda, upon advice from counsel, pled guilty to Theft in the Second Degree – Welfare Fraud. Her judgement and sentence indicate that her conviction was for a violation of both RCW 74.08.331 (Welfare Fraud) and RCW 9A.56.040(1)(a)(Theft Second Degree). In May 2014, Immigration and Customs Enforcement (ICE) initiated removal proceedings against her.

10. Although subject to removal (deportation) for entering and being present in the US without lawful immigration status (a.k.a. being undocumented), the immigration judge has the authority to grant qualifying individuals, like Ms. Olivares-Castaneda, who have been present

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in the US for at least 10 years and have US citizen children, relief from removal known as "cancellation of removal". A grant of cancellation of removal allows an undocumented person to lawfully remain in the US and become a lawful permanent resident (a.k.a. a greencard holder). See § 8 USC 1229b(b). A conviction classified as a "crime involving moral turpitude" will disqualify an applicant and bar the immigration judge from granting cancellation of removal. § 8 USC 1229b(b)(1)(C).

11. In his declaration, defense counsel, Gerald Wear, indicates that he "believes" he advised Ms. Olivares-Castaneda that her conviction would subject her to deportation, but that he "may not" have advised her that it would also render her ineligible for cancellation of removal. He does not indicate that he provided this advice in reliance on information obtained from having accessed or consulted with the available immigration law resources, such as immigration statutes, caselaw or WDA's Immigration Project, as *Padilla* requires. See *Padilla* at 1484. We do not have a record indicating that he consulted with us.

12. Mr. Wear provides no information to indicate that he took any affirmative steps to identify the specific immigration consequences to his client of entering a plea to the crime of welfare fraud. Nor is there evidence that he assisted her in making an informed choice about whether to waive her right to a jury trial and enter a guilty plea that would result in a conviction that foreclosed her ability to qualify for cancellation of removal. Additionally, there is no evidence that counsel engaged in plea negotiations to advocate for a resolution that would have avoided deportation by preserving her eligibility to seek cancellation of removal. Other than asserting that she could get "picked up" by immigration authorities, Ms. Olivares-Castaneda maintains that defense counsel never advised her of the immigration consequences of entering a guilty plea to Theft Second Degree – Welfare Fraud.

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13. Had Mr. Wear contacted WDA's Immigration Project, we would have informed him that since his client had resided in the US for more than 10 years and has four US citizen children, she would be eligible to obtain lawful status (a greencard) from the immigration judge in removal proceedings. As such, preserving her ability eligibility should have been a primary concern in resolving her criminal charges. We would have provided him with our standard advice about these offenses, namely, that it is clear under immigration law that a conviction for Theft Second Degree that was expressly tied to Welfare Fraud under RCW 74.08.331 would be classified as a crime involving moral turpitude and render his client ineligible for cancellation of removal and, thus, subject to deportation (removal).

14. We would have informed Mr. Wear that our analysis is based on *State v. Delcambre*, 116 Wn.2d 444, 805 P.2d 233 (1991). Under *Delcambre*, it is clear that Washington law treats the instant conviction not as a crime for Theft Second Degree, but as a distinct crime of Welfare Fraud under RCW § 74.08.331. The elements necessary for a conviction under this statute expressly require willful misrepresentations and/or false statements to obtain welfare benefits. As such, this crime clearly constitutes a crime involving moral turpitude under immigration law. *See Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1076 (9th Cir. 2007)(en banc) (defining crimes of moral turpitude to include crimes that have as elements conduct involving knowingly false representations to gain something of value.)

15. In removal proceedings, Ms. Olivares-Castaneda bears the burden to establish that she qualifies for a grant of cancellation of removal and is required to disclose her criminal convictions and provide relevant documentation. See 8 USC § 1229a(C)(4). The immigration judge will review and rely upon the Judgement and Sentence ("J&S") in this case, which states that the conviction was for Theft in the Second Degree – Welfare Fraud and references

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the RCW statute for both offenses. The immigration judge would not be permitted to consult additional documents here as it is clear from the J&S that Ms. Olivares-Castaneda was convicted under RCW § 74.08.331, which, as outlined *supra*, is categorically a crime involving moral turpitude under immigration law. See *Descamps v. United States*, 133 S.Ct. 2276 (2013) (Under the categorical approach, where the elements of the state statute of conviction are clearly analogous to the federal statute at issue the crime is a categorical match and the analysis ends there).

16. Even assuming *arguendo* that there was some ambiguity as to Ms. Olivarez-Castaneda's offense of conviction, the immigration judge would be permitted to consult the plea transcript, which clarifies per the plea colloquy that the crime of conviction was Welfare Fraud (not merely Theft Second Degree). *See Descamps* 133 S.Ct. at 2284. The fact that Ms. Olivares-Castaneda's plea statement lists only Theft Second Degree would not suffice to limit the conviction to simply that offense in light of her admissions in the plea colloquy.

17. In addition to alerting defense counsel that Theft Second Degree – Welfare Fraud was clearly a crime involving moral turpitude, we would also have provided Mr. Wear with alternative options for negotiating a plea to an offense that was not so classified and that would not have rendered her ineligible for cancellation of removal. Specifically, we would have advised Mr. Wear of three alternatives: 1. A plea to Malicious Mischief Second Degree (an immigration-safe resolution commonly agreed to by prosecutors in theft-related cases); 2. A straight Theft Second Degree plea with a "clean" charging document, plea and J&S that did not reference RCW 74.08.331 – Welfare Fraud at all; 3. An *In Re Barr* plea to some other agreed-upon immigration-safe offense. Under *In Re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984), a defendant is permitted to plead guilty to a crime that he did not commit, or for which there is

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an insufficient factual basis in order to take advantage of a prosecutorial offer. WDA's Immigration Project staff regularly assist defenders in negotiating *Barr* pleas to crimes that do not trigger deportation but provide the prosecutor with what they believe is necessary to resolve the criminal charges.

18. If plea negotiations to obtain an immigration-safe resolution were not successful, we would have explained to Mr. Wear the importance of clearly advising his client that a plea to Theft Second Degree-Welfare Fraud would render her ineligible for cancellation of removal and result in her deportation to Mexico and, at that juncture, she may want to consider exercising her right to trial. As the *Sandoval* Court recognized, faced with the severe consequences of deportation, going to trial and risking a significantly higher sentence is a reasonable choice. *See Sandoval* at 1022.

19. In the course of our case consultations, we regularly provide this type of advice and support to defense counsel. And we regularly see prosecutors, informed with this additional information (including that the defendant agrees to more jail time, greater fines, and additional probation conditions), agree to permit the defendant, particularly defendants with no priors such as Ms. Olivares-Castaneda, to plead guilty to an equivalent offense that does not trigger deportation. Additionally, we also see defendants exercise their right to trial when and immigration-safe plea offer is not obtainable.

Signed this 28th day of April, 2015 at Seattle, Washington.

Ann E. Benson
WSBA #43781

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